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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1969.

No. 897

WALTER A. YOUNGE, M. D.,
Petitioner,

v.

STATE BOARD OF REGISTRATION FOR THE HEALING ARTS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1969.

No.....

WALTER A. YOUNGE, M. D.,
Petitioner,

v.

STATE BOARD OF REGISTRATION FOR THE HEALING ARTS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Missouri, entered in this cause on July 14, 1969.

OPINION BELOW.

The opinion of the Supreme Court of Missouri, not yet reported, is printed in Appendix A, *infra* (Tr. 517-28).[1]

JURISDICTION.

The judgment of the Supreme Court of Missouri (Appendix B, *infra*; Tr. 516), was entered on July 14, 1969. A timely motion for rehearing or in the alternative to

[1] "Tr." references are to the Transcript of the Record in the Supreme Court of Missouri.

transfer to the Court *en banc* (Tr. 530-31) was denied on September 8, 1969 (Appendix C, *infra*; Tr. 545). The jurisdiction of this Court is invoked under 28 U. S. C., § 1257 (3).

QUESTIONS PRESENTED.

1. Whether a proceeding to revoke petitioner's license to practice medicine in Missouri for allegedly performing an abortion imposes punitive sactions, so that such a proceeding after a jury had acquitted petitioner in a prior criminal prosecution for the same alleged abortion, violates the Fifth Amendment as applicable to the States through the Fourteenth Amendment of the Constitution of the United States by placing petitioner twice in jeopardy for the same offense?

2. (A) Whether the legal principles of collateral estoppel or res judicata are constitutional requirements of due process under the Fourteenth Amendment of the Constitution of the United States?

(B) Should the principles of collateral estoppel or res judicata have barred a proceeding to revoke petitioner's license to practice medicine in Missouri for allegedly performing an abortion, where a jury in a prior criminal prosecution had found that petitioner did not perform the same alleged abortion?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Fifth Amendment, Constitution of the United States, provides in pertinent part:

> ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;"

Fourteenth Amendment, Constitution of the United States provides in pertinent part:

". . . , nor shall any State deprive any person of life, liberty, or property without due process of law;"

Mo. Rev. Stat., § 334.100, provides in pertinent part:

"1. The board may refuse to license individuals of bad moral character, or persons guilty of unprofessional or dishonorable conduct; and it may, on its own information or on complaint of any person, place a licensee on probation, revoke or suspend a license or other right to practice, however derived, for like causes as hereinafter provided. Without limiting the foregoing general language, the following specifications shall be deemed unprofessional and dishonorable conduct within the meaning of this section:

. . . . . .

"(3) Committing an unlawful abortion;

. . . . . .

"(2) At least twenty days prior to the date set for any hearing before the board for the revocation or suspension of license, the secretary shall cause written notice to be served personally upon the **accused** wherever he may be found in the state, in the manner prescribed for the serving of original writs in civil actions. If the **accused** cannot be found in this state, the board shall cause the notice to be published for a period of not less than twenty days in a newspaper of general circulation in the county in which the accused maintained his last known residence in this state, the last publication to be not less than twenty nor more than thirty days prior to the date set for hearing. The notice shall contain an exact statement of the **charges** and the date and place set for the hearing before the board. If the party thus notified fails to appear, either in person or by counsel, the board shall proceed with the hearing. The board may receive and consider depositions and oral statements,

and shall cause stenographic reports of the oral testimony to be taken and transcribed, which, together with all other papers pertaining thereto shall be preserved for two years. If a majority of the board is satisfied that the licentiate is **guilty** of any of the **offenses charged**, the license shall be revoked or suspended for such period of time as may be determined. Before a license is revoked, there shall be included in the majority of the board voting for the revocation, the vote of at least one board member, if any, who is a graduate of a professional school approved and accredited as reputable by the association which has approved and accredited as reputable the professional school from which the licentiate himself graduated.

"3. Any person whose license is revoked or suspended by the board shall have the right to have the proceedings reviewed as provided by law for the review of decisions, rules and regulations of administrative officers and bodies existing under the constitution and laws of this state." (Emphasis added.)

STATEMENT OF THE CASE.

Petitioner was indicted in the Circuit Court of the City of St. Louis, State of Missouri, on the charge of having committed an unlawful abortion on Margaret Pyle Portwood on February 11, 1966. On April 21, 1966, respondent, the Missouri State Board of Registration for the Healing Arts, filed a complaint against petitioner before the Administrative Hearing Commission alleging, as in the indictment, that on February 11, 1966, petitioner committed an unlawful abortion on Margaret Ann Pyles (Tr. 35-36).[2] The State Board of Registration for the Healing Arts is an agency of the State of Missouri, created by Mo. Rev.

[2] Margaret Ann Pyles and Margaret Pyle Portwood are the same person, as she married Robert Portwood on March 18, 1966 (Tr. 27, 98).

Stat., § 334.120 and included in the Department of Education under Mo. Rev. Stat., §§ 161.012; 161.212.

Following a jury trial on September 15, 1966, petitioner was acquitted of the criminal charge (Tr. 225), in **State v. Younge**, Circuit Court of the City of St. Louis, Division 20, No. 1584-0.

On November 1, 1966, petitioner filed a motion to dismiss the complaint before the Hearing Commissioner on the ground that having been acquitted in the criminal case, such acquittal was a bar to the proceeding before the Hearing Commissioner under the principles of collateral estoppel and res judicata (Tr. 37). On December 20, 1966 the Administrative Hearing Commisisoner denied the motion to dismiss (Tr. 40), and thereafter testimony was had before the Hearing Commissioner.

The factual issues in the proceeding before the Hearing Commissioner were identical with those in the criminal prosecution. Moreover, the witnesses at the criminal trial and the proceeding before the Hearing Commissioner were the same, with the exception that one State witness, who testified at the criminal trial that she had made the arrangements for the abortion, was not called by respondent at the proceeding before the Hearing Commissioner. The evidence adduced at the criminal trial and before the Hearing Commissioner was substantially the same, with the exception of minor discrepancies or inconsistencies, and the transcript of testimony of three witnesses at the criminal trial was admitted by stipulation as evidence in the proceeding before the Hearing Commissioner (Pet. Ex. 8, Tr. 320-38; Pet. Ex. 10, Tr. 339-80; Resp. Ex. 1, Tr. 381A-83; Resp. Ex. 8, Tr. 388-422).[3]

On September 15, 1967, the Administrative Hearing Commissioner filed its Findings of Fact, Conclusions of

[3] "Pet. Ex." references are to Petitioner's Exhibits and "Resp. Ex." references are to Respondent's Exhibits before the Administrative Hearing Commissioner.

Law and Decision finding that Dr. Younge had performed the alleged abortion (Tr. 423-30). The State Board of Registration for the Healing Arts entered an order on November 7, 1967, revoking petitioner's license, with permission being granted to petitioner to apply for reinstatement after the order of revocation had been in effect for six months (Tr. 436-37).

On November 17, 1967, petitioner filed a petition for review in the Circuit Court of the City of St. Louis, Missouri, praying that the Court reverse the Order of Revocation of petitioner's license to practice the healing arts in the State of Missouri, on the grounds, *inter alia,* that the Complaint, Decision and Order were (a) "in violation of . . . the Fifth and Fourteenth Amendments of the Constitution of the United States in that they twice placed [petitioner] in jeopardy for the same offense and deprived him of due process of law" and (b) "were authorized by law for the reasons that they were barred by the principals (sic) of collateral estoppel and res judicata . . ." (Tr. 23-24). On August 27, 1968, the Circuit Court of the City of St. Louis, Aronson, J., affirmed the findings, order and decision of the respondent (Tr. 438), stating in a memorandum opinion:

> "Finally this Court is convinced that there is no issue of res judicata, collateral estoppel, nor double jeopardy involved here, based on the petitioner's acquittal of a criminal charge of abortion arising from the same facts. In criminal cases the State must make proof beyond a reasonable doubt of the guilt of a person charged with an offense. In proceedings concerning the revocation or suspension of licenses an Administrative Agency makes its determination on the basis of what it believes to be the greater weight of the evidence. Without unnecessarily prolonging this memorandum, it is clear that the result of the

criminal prosecution does not bar the Administrative Agency proceedings which are here being reviewed, and the result of the criminal prosecution is not binding upon, nor even relevant to this case" (Tr. 440).

The judgment was affirmed by the Supreme Court of Missouri, Division 1, on July 14, 1969 (Appendix B, *infra;* Tr. 516). In its opinion, the Court held that "the provisions against double jeopardy do not apply", stating as a basis for its holding that:

". . . [W]e now hold that our revocation statute is **not** penal in nature and we reaffirm the later doctrine as just stated. In this view, it is wholly unnecessary to consider the many authorities cited from other states for our own policy is established. These revocation proceedings are not penal, they are not 'quasi-criminal,' they do not contemplate 'punitive' sanctions and the provisions against double jeopardy do not apply. The appellant is not being tried again for the same 'offense'. He is not, in fact, being tried for any offense." (Appendix A, *infra*, at pp. A-5-A-6; Tr. 521.)

The Court further held that the revocation proceeding was not barred by the principle of res judicata or collateral estoppel, stating:

"Those cases are not in point here, for in them the parties were identical, the causes of action were held to be the same, and the thing sued for (the punishment, divided into parts) was the same (cit. omitted).

"In this case the parties are not the same; in the criminal case the State of Missouri was the prosecuting party, whereas in the present proceeding the only party adverse to appellant is the Board, which is **not** the State, but a 'legal entity in the nature of a quasi public corporation' (cit. omitted). The causes of action are not the same; the first was strictly criminal with the aim and purpose of punishment; the

present proceeding is administrative in nature, remedial and not penal. For the latter reason the thing sued for was and is not the same in the two proceedings. We have said enough to demonstrate that no determination made in the criminal case can be binding here by way of collateral estoppel or, if preferred, as res adjudicata. The Board was free to pursue its own proceedings independently. The point is denied." (Appendix A, *infra*, at pp. A-7-A-8; Tr. 523-24.)

REASONS FOR GRANTING THE WRIT.

1. Double Jeopardy.

Last term, this Court first held the Fifth Amendment guarantee against double jeopardy applicable to the States through the due process clause of the Fourteenth Amendment. **Benton v. Maryland**, ... U. S. ..., 89 S. Ct. 2056, ... L. Ed. ... (1969). The decision below of the Supreme Court of Missouri involving that fundamental guarantee is not in accord with applicable decisions of this Court, which hold that an acquittal in a criminal prosecution bars a subsequent civil action imposing punitive sanctions. See e. g., **United States v. LaFranca**, 282 U. S. 568, 51 S. Ct. 278, 75 L. Ed. 551 (1931); **United States v. Chouteau**, 102 U. S. (12 Otto) 603, 26 L. Ed. 246 (1880); **United States v. Ulrici**, 102 U. S. (12 Otto) 612, 26 L. Ed. 249 (1880).[4] Of course, the applicability of the above authority

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[4] In **Helvering v. Mitchell**, 303 U. S. 391, 398, 58 S. Ct. 630, 632, 82 L. Ed. 917, 921 (1938), this Court although finding the 50 per cent civil fraud addition to tax deficiencies remedial in nature, nevertheless stated the law as follows:

> "Where the objective of the subsequent action likewise is punishment, the acquittal is a bar, because to entertain the second proceeding for punishment would subject the defendant to double jeopardy; and double jeopardy is precluded by the Fifth Amendment whether the verdict was an acquittal or a conviction."

See also, **United States ex rel. Marcus v. Hess**, 317 U. S. 537, 63 S. Ct. 379, 87 L. Ed. 443 (1943).

depends upon whether the physicians' license revocation statute under Mo. Rev. Stat., § 334.100 is construed as penal in nature.

In the instant case, the Supreme Court of Missouri found that Mo. Rev. Stat., § 334.100 was not penal in nature, not quasi-criminal and did not contemplate punitive sanctions (Appendix A, *infra* at p. A-5, Tr. 521).[5] However, the decisions in a host of other states have held license revocation statutes similar to Mo. Rev. Stat., § 334.100 to be penal. See, **Texas State Board of Medical Examiners v. McClellan,** 307 S. W. 2d 317, 320 (Tex. App. 1957); **In re Kindschi,** 52 Wash. 2d 8, 319 P. 2d 824, 825 (1958); **Schireson v. Shafer,** 354 Pa. 458, 47 A. 2d 665, 667, 165 A. L. R. 1133, 1137 (1946); **Fuller v. Board of Medical Examiners,** 14 Cal. App. 2d 734, 59 P. 2d 171, 175 (1936); **Randall v. Board of Medical Examiners,** 110 Cal. App. 61, 293 P. 790 (1930); **New Jersey State Board of Optometrists v. Nemitz,** 21 N. J. Super. 18, 90 A. 2d 740, 747 (1952); **State ex rel. Jordan v. Pattishall,** 99 Fla. 296, 126 So. 147, 148 (1930); **Jacoby v. South Carolina State Board,** 219 S. C. 66, 64 S. E. 2d 138, 151 (1951); **Mississippi State Board of Dental Examiners v. Mandell,** 198 Miss. 49, 21 So. 2d 405, 409 (1945).[6] In fact, 41 Am.

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[5] It should be noted that the Supreme Court of Missouri once held the predecessor of Mo. Rev. Stat., § 334.100 highly penal in the cases of **State ex rel. Spriggs v. Robinson,** 253 Mo. 271, 284, 161 S. W. 1169, 1172 (1913) and **State ex rel. Johnson v. Clark,** 288 Mo. 659, 671, 232 S. W. 1031, 1034 (1921), but overruled those decisions in **State ex rel. Lentine v. State Board of Health,** 334 Mo. 220, 236, 65 S. W. 2d 943, 951 (1933) and **Hughes v. State Board of Health,** 348 Mo. 1236, 1240, 159 S. W. 2d 277, 279 (1942).

[6] The Supreme Court of Missouri although apprised of the contrary decisions in other states (Appellant's Statement, Brief and Argument; Tr. 468-69), stated that it was "wholly unnecessary to consider the many authorities cited from other states for our own policy is established" (Appendix A, *infra*, at p. A-5; Tr. 521). As grounds for a motion for rehearing or in the al-

Jur. 172, **Physicians and Surgeons**, § 44, states as a broad rule:

> "The license to practice medicine is a valuable property right, and a statute authorizing revocation of a license to practice medicine must be strictly followed. **Such statutes are highly penal** and must be construed in the physician's favor." (Emphasis supplied).

See also, **State v. Buck**, 200 Or. 87, 262 P. 2d 495, 511 (Rossman, J. concurring) (1953).

As the matter now stands, if petitioner had been practicing medicine in California, Florida, Mississippi, New Jersey, Pennsylvania, South Carolina, Texas or Washington, the proceeding to revoke his license would have been barred as placing petitioner twice in jeopardy for the same offense, whereas in Missouri that right is rendered futile. Yet, where as here, an important constitutional right turns on the judicial construction of a statute, justice demands that the statute not be interpreted in an *ad hoc* subjective manner in the various states. As such, the question presented here is of great importance in the administration of criminal justice in order to apply the guarantee against double jeopardy uniformly and consistently in the various states. The case at bar presents a singular opportunity for the Court to review and settle the applicable law. Petitioner also points out to the Court the use of the terms "accused," "charges," "guilty" and "offenses" in Mo. Rev. Stat., § 334.100 2., which are terms commonly used in penal statutes.

Additionally, the decision below is not in accord with applicable decisions of this Court, which have character-

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ternative to transfer to the Court en banc, petitioner pointed out the failure of the Court to consider the authority from other states (Tr. 530). The motion was overruled without an opinion. (Appendix C, *infra*; Tr. 545).

ized analogous administrative proceedings for the revocation of a privilege or license as penal. See i. e., **Cummings v. Missouri**, 71 U. S. (4 Wall.) 277, 320-22, 18 L. Ed. 356, 362 (1867); **Ex parte Garland**, 71 U. S. (4 Wall.) 333, 380, 18 L. Ed. 366, 370 (1867) (revocation of and prevention from holding office of honor, and being officer or director of corporation or engaging in certain professions); **Bridges v. Wixon**, 326 U. S. 135, 154, 65 S. Ct. 1443, 1452, 89 L. Ed. 2103 (1945); **Jordan v. DeGeorge**, 341 U. S. 223, 231, 71 S. Ct. 703, 708, 95 L. Ed. 886 (1951); **Fong Haw Tan v. Phelan**, 333 U. S. 6, 10, 68 S. Ct. 374, 376, 92 L. Ed. 433 (1948) (deportation); **Kennedy v. Mendoza-Martinez**, 372 U. S. 144, 165-67, 83 S. Ct. 554, 566-67, 9 L. Ed. 2d 644 (1963) (loss of nationality); **Spevack v. Klein**, 385 U. S. 511, 514-15, 87 S. Ct. 625, 628, 17 L. Ed. 2d 574 (1967) (disbarment). Whether license revocation proceedings fall within the category of the above cases as penal, is an issue that should be determined by this Court.

2. **Collateral Estoppel and Res Judicata.**

(A) This Court has never decided whether the legal principles of collateral estoppel and res judicata are constitutional requirements of due process under the Fourteenth Amendment to the United States Constitution. **Hoag v. New Jersey**, 356 U. S. 464, 471, 78 S. Ct. 829, 834, 2 L. Ed. 2d 913 (1958). See also, **United States v. Rangel-Perez**, 179 F. Supp. 619, 623 (S. D. Calif. 1959). But the question posited is one of great magnitude and far reaching scope, because of the multitudinous situations similar to the case at bar. See the recent discussion of this issue in McElroy, **Double Jeopardy: The Ephemeral Guarantee**, 5 Crim. L. Bull. 375, 395-98 (1969).

(B) If the principles of collateral estoppel and res judicata are constitutional requirements of due process,

then the decision of the Supreme Court of Missouri in the present case is not in accord with **Coffey v. United States**, 116 U. S. 436, 6 S. Ct. 437, 29 L. Ed. 684 (1896). There, a three count information was filed for the forfeiture of distilling equipment and liquor for unlawfully withdrawing the liquor without payment of the tax thereon with intent to defraud the United States. Prior to the civil forfeiture proceeding, Coffey had been acquitted of criminal charges arising out of the same facts. This Court held that the acquittal on the criminal prosecution barred the civil forfeiture proceeding, stating:

> "Yet, where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit *in rem* by the United States, where, as against him the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem*. It is urged as a reason for not allowing such effect to the judgment, that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt; and that, on the same evidence, on the question of preponderance of proof, there might be a verdict for the United States, in the suit *in rem*. Nevertheless, the fact or act has been put in issue and determined against the United States; and all that is imposed by the Statute, as a consequence of guilt, is a punishment therefore. There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant. *Id.*, 116 U. S., at 443, 29 L. Ed. at 687.

Although the Supreme Court of Missouri doubts the vigor of the **Coffey** case,[7] the Court apparently attempts to avoid the rationale of that decision by ruling that in the instant case the parties are not the same, the causes of action are not the same and the thing sued for (the punishment divided into parts) is not the same (See Appendix A, *infra*, at p. A-7; Tr. 523-24). As to the Court's contention that the parties are not the same, the State Board of Registration for the Healing Arts is an agency of the State of Missouri created by Mo. Rev. Stat., § 334.120 and included in the department of education under Mo. Rev. Stat., §§ 161.012, 161.212. Petitioner submits that at least insofar as the principles of collateral estoppel and res judicata are concerned the nexus between the State of Missouri (the plaintiff in the criminal prosecution) and the State Board of Registration for the Healing Arts (the plaintiff in the instant proceeding) is sufficient to establish the requisite identity of parties.

As to the latter two contentions by the Supreme Court of Missouri, petitioner points out that identity of causes of action is not required under the principle of collateral estoppel, Annot., 9 A. L. R., 3d 203, 221-22 (1966), and in any event the basis for the Supreme Court of Missouri holding that the causes of action and thing sued for were not the same was that the criminal prosecution was penal and the revocation proceeding remedial. Yet whether or not the revocation proceeding is punitive, as before stated, is an important question in the uniform administration of criminal justice, see pp. 9-10, *supra*, and even more so

[7] In its opinion the Supreme Court of Missouri stated with respect to the **Coffey** case: "The case has been rather roundly criticized, U. S. v. One Dodge Sedan, (CA 3) 113 F. 2d 552, and it has been distinguished in the later case of **Helvering v. Mitchell**, *supra*, 303 U. S. at pp. 405-406, as inapplicable when the subsequent proceeding is **administrative** in nature" (Appendix A, *infra*, at p. A-6; Tr. 523). Nevertheless the **Coffey** case has never been overruled, despite the fact that it has been on the books for ¾ of a century.

necessary for determination, if collateral estoppel and res judicata are constitutional requirements of due process under the Fourteenth Amendment to the Constitution. Further, the instant case presents an opportunity for the Court to review the validity, scope and extent of its decision in **Coffey v. United States**, *supra*, in light of the criticism aimed at that case by inferior courts.

CONCLUSION.

For all of the reasons advanced, the petition should be granted.

Respectfully submitted,

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APPENDIX.

APPENDIX A.

In the Supreme Court of Missouri,
Division Number One.

Walter A. Younge, M. D.,
Appellant,
vs.
State Board of Registration for the Healing Arts,
Respondent.
No. 54,160.

Appeal From the Circuit Court of the City of St. Louis,
Honorable Robert L. Aronson, Judge.

This is an appeal from an order of the Circuit Court affirming, on petition for review, an order of the State Board of Registration for the Healing Arts revoking appellant's license to practice the healing arts. We note here, however, that the Board's order gave him leave to apply for reinstatement after a period of six months. We shall reserve a statement of the facts for our consideration of appellant's point on the supposed insufficiency of the evidence. We state here, however, enough of the circumstances for a consideration of his first two points.

A complaint was filed on April 21, 1966 by the Respondent Board charging that appellant on February 11, 1966, performed an unlawful abortion on one Margaret Ann Pyles in violation of § 334.100, 1 (3);[1] it asked that service be had, a hearing held, and that the Administrative Hearing Commission transmit its findings of fact and conclusions of law (See §§ 161.252-.342, 1967 Cum. Supp.). The appellant answered denying the allegations. There-

[1] The correct name is Pyle, but no point is made on this.

after, appellant having been indicted in the City of St. Louis for the criminal offense of abortion, was acquitted after trial by a jury. Following that acquittal he moved to dismiss the present complaint on the grounds of res adjudicata and collateral estoppel. The motion was overruled by the Hearing Commissioner after consideration of memorandum briefs.

The petition for review filed in the circuit court on November 17, 1967, asserts that the findings, conclusions, decision and order are erroneous, because: (1) they are in violation of the double jeopardy provisions of both the state and federal constitutions (citing appropriate articles and sections) and of due process; (2) that appellant's acquittal in the criminal case was a bar to the present proceedings under the principle of res adjudicata and collateral estoppel; and (3) that the findings were not supported by competent and substantial evidence upon the whole record. The same three points are now raised in appellant's brief here and we shall not need to restate them as such. Upon the filing of the petition the circuit court stayed the order of revocation. When it later affirmed, that order was vacated. When the appeal was lodged here we entered an order again staying the revocation until the further order of this court.

Respondent Board has also filed a motion for the transfer of the case to the St. Louis Court of Appeals on the ground that the supposed constitutional question or questions are not substantial, but merely colorable. We hold first that the state is not a party and that we do not have jurisdiction on that ground. Gaddy v. State Board of Registration, Mo., 394 S. W. 2d 284. We must still determine, however, whether there is substance to the contention of double jeopardy. Respondent says there is none, because the present proceedings are administrative and do not constitute a criminal case within the constitutional

prohibitions. Noting that we have been required to spend at least two days in examining the authorities before deciding the question, we find that the contention of constitutional construction is not merely colorable, and that we have jurisdiction. The motion to transfer is overruled. We have concluded, however, that the appellant **has not** by the present proceedings been put "again in jeopardy" for the same offense (Art. 1, § 19, Const. Mo.) nor has he been "twice put in jeopardy" for the same offense. (5th Am. U. S. Const.) It will be impossible to discuss all of the cases cited. Appellant has cited 51 cases and 4 miscellaneous authorities on this point alone. While perhaps we are only obligated by Rule 83.05 to examine the first three, we have chosen to examine most of the others. We see no justification for such a multitudinous citation of authorities, and we do not feel that the practice is within the spirit of our rules.

Appellant seemingly relies primarily upon his stated proposition that the double jeopardy clauses (and we need not distinguish here between the state and federal) bar a subsequent civil action seeking to impose "punitive sanctions" after the defendant has been acquitted in a criminal trial. His leading authority seems to be the case of United States v. Chouteau, 102 U. S. 603, 26 L. Ed. 246. There a distiller had been indicted for illegal diversion of liquor without payment of the tax; he effected a compromise with the government, paid the agreed amount, and the indictments were dismissed. The statute imposed a fine, imprisonment and a "penalty of double the tax imposed * * *" for any violation. The government then sued him and his sureties on his distiller's bond for the penalties provided in the statutes (presumably the double tax) and he pleaded the compromise in bar. The court held that a recovery of the penalty was made a part of the "punishment" for the offense and that it could have been enforced (like the fine and imprisonment) by a crim-

inal prosecution, had the government so chosen; that this was demonstrated by the fact that anyone who "aided or abetted" was likewise made liable for the penalty, though not otherwise interested in the property. So holding, the court further held that the compromise of the criminal cases covered all the penalties and all "punishment" for the acts in question. We regard the case as not persuasive on our facts. The same is true (on rather similar facts) of U. S. v. La Franca, 282 U. S. 568, 75 L. Ed. 551, and U. S. v. Glidden Co. (CA 6), 78 F. 2d 639, also cited. The cases of U. S. ex rel. Marcus v. Hess, 317 U. S. 537, 87 L. Ed. 443, and Murphy v. U. S., 272 U. S. 630, 71 L. Ed. 446, also cited, seem to us to be more adverse to appellant's position than favorable. It is impossible, within any reasonable space, to discuss all such cases. The case of Kennedy v. Mendoza-Martinez, 372 U. S. 144, 9 L. Ed. 2d 644, held that a statute depriving one of citizenship, without notice or hearing, for leaving or remaining outside the United States for the purpose of evading military service, violated due process; the court spoke of the imposition as a "punishment," but we do not consider the case applicable on our facts. It did not concern double jeopardy.

In Helvering v. Mitchell, 303 U. S. 391, 82 L. Ed. 917, cited by respondent, it was held that an acquittal in an income tax evasion trial did not bar a subsequent suit for a 50% additional assessment imposed and assessed under the statute. The court noted the difference in the degrees of proof required in the criminal and civil cases, and also noted that the requirement of the additional assessment should be considered as remedial in nature, and **not** a punishment. The court discussed and gave illustrations of various "remedial" sanctions (including that of disbarment), and held generally that the constitutional guarantees of criminal prosecutions did not apply to actions or administrative proceedings of such nature. The opinion is

a very effective answer to the federal cases cited by appellant, and we shall not elaborate upon them further.

Insofar as the Missouri authorities are concerned, appellant relies chiefly on State ex rel. Spriggs v. Robinson, Mo., 161 S. W. 1169, and State ex rel. Johnson v. Clark, Mo., 232 S. W. 1031. It was stated in Spriggs that the then-existing statute providing for the revocation of the licenses of physicians was penal in nature and was to be construed liberally in favor of the physician, because it deprived one of a "valuable privilege." In Johnson, supra, the statement in Spriggs was merely repeated with reference to the admissibility of certain evidence. Counsel would use these cases as authority to the effect that our present statute is penal, that revocation is therefore a punishment, and that this proceeding subjects appellant to a second trial for the same "offense." Insofar as Spriggs and Johnson held the statute to be penal, they have been overruled. Hughes v. State Board of Health, Mo., 159 S. W. 2d 277; Gaddy v. State Board of Registration, Mo. App., 397 S. W. 2d 347; Bittiker v. State Board of Registration, Mo. App., 404 S. W. 2d 402; State ex rel. Lentine v. State Board of Health, Mo., 65 S. W. 2d 943. In Hughes, the court directly held that (in this respect) the Spriggs case had been overruled, that the statute was one "for the protection of the public in safeguarding public health," and that it was not an imposition of punishment. Counsel for appellant seems to doubt the effect of these later decisions. If any doubt remains, and there should be none, we now hold that our revocation statute is **not** penal in nature and we reaffirm the later doctrine as just stated. In this view, it is wholly unnecessary to consider the many authorities cited from other states for our own policy is established. These revocation proceedings are not penal, they are not "quasi-criminal," they do not contemplate "punitive" sanctions and the provisions against double jeopardy do not apply. The appellant is not being tried

again for the same "offense." He is not, in fact, being tried for any offense.

Appellant next contends that the judgment of acquittal in the criminal case was res adjudicata or, in the alternative, that it constituted a collateral estoppel. The terms are used more or less interchangeably here and we shall consider the single principle. Before proceeding further we note the requirements as generally recognized, as follows: there must be identity of the persons and parties, identity of the cause of action, identity of the thing sued for, and identity of the quality of the person for or against whom the claim is made. Prentzler v. Schneider, Mo. Banc, 411 S. W. 2d 135; State ex rel. Dalton v. Reorg. Dist. No. 11, Mo. Banc, 307 S. W. 2d 501. The principle may be applicable to a material fact litigated in the prior proceeding, subject to the same requirements. In that event it is more properly described, perhaps, as a collateral estoppel. The acquittal in the criminal proceeding determined that the State had not established beyond a reasonable doubt that this appellant was guilty. In State ex rel. Hurwitz v. North, Mo., 264 S. W. 678, aff. 271 U. S. 40, 70 L. Ed. 818, the court held that there was no reason for postponing the hearing in a revocation proceeding until after a criminal prosecution (for an abortion) was terminated. This would certainly indicate that the court felt that the two proceedings were wholly independent and unrelated. In Lewis v. Frick, 233 U. S. 291, the distinctions between "a criminal prosecution and an administrative inquiry" were discussed in detail and recognized, and the court held that an acquittal in criminal proceedings for unlawfully importing a woman into the United States for prostitution was not res adjudicata in subsequent proceedings for deportation of the defendant for the same act. See also Helvering v. Mitchell, 303 U. S. 391, 82 L. Ed. 917, cited supra, which ruled against a contention of res adjudicata on its facts as previously discussed.

In our case of In re Sympson, Mo., 322 S. W. 2d 808, the court held that a disbarment proceeding was not maintained for punishment, but for the protection of the public and the bar; and the court further noted there that an acquittal upon a criminal charge is not a defense to a disbarment proceeding for the same acts. See also In re Richards, Mo., 63 S. W. 2d 672.

Appellant relies strongly on Coffey v. U. S., 116 U. S. 436, 29 L. Ed. 684, where the defendant had been acquitted on a criminal charge involving the unlawful withdrawal of liquor without payment of the tax. In a subsequent proceeding in rem for the forfeiture of the property involved, it was held that the acquittal was a bar, because the fact of no statutory violation had been determined there; the court noted that the parties were the same and that the issues were precisely the same, including the element of intent. The case has been rather roundly criticized, U. S. v. One Dodge Sedan, (CA 3) 113 F. 2d 552, and it has been distinguished in the later case of Helvering v. Mitchell, supra, 303 U. S. at pp. 405-406, as inapplicable when the subsequent proceeding is **administrative** in nature. We do not regard the Coffey case as applicable here. We have considered appellant's other cases and they are not persuasive. Certain of these also involve the forfeiture of property by the government, after the trial of a criminal case; they hold generally that the forfeiture is essentially a criminal proceeding and that it seeks to enforce a part of the punishment provided by the statute, other parts being fine and imprisonment; thus it was held, in some instances, that the result of the original case was res adjudicata. Those cases are not in point here, for in them the parties were identical, the causes of action were held to be the same, and the thing sued for (the punishment, divided into parts) was the same. Boyd v. U. S., 116 U. S. 616, 29 L. Ed. 746; U. S. v. One De Soto Sedan (D. C. N. C.), 85 F. Supp. 245, aff. 180 F. 2d 583.

In this case the parties are not the same; in the criminal case the State of Missouri was the prosecuting party, whereas in the present proceeding the only party adverse to appellant is the Board, which is **not** the State, but a "legal entity in the nature of a quasi public corporation." Gaddy v. State Board of Registration, Mo., 394 S. W. 2d 284. The causes of action are not the same; the first was strictly criminal with the aim and purpose of punishment; the present proceeding is administrative in nature, remedial and not penal. For the latter reason the thing sued for was and is not the same in the two proceedings. We have said enough to demonstrate that no determination made in the criminal case can be binding here by way of collateral estoppel or, if preferred, as res adjudicata. The Board was free to pursue its own proceedings independently. The point is denied.

The last point of appellant is that the findings, conclusions, decision and order are not supported by competent and substantial evidence upon the whole record, § 536.140, R. S. Mo. 1959, V. A. M. S., and that they are contrary to the overwhelming weight of the evidence. The force of this contention was considerably blunted when counsel conceded on page 35 of their brief that "* * * case resolves itself to questions of credibility." In effect they argue that because a jury failed to convict appellant on similar evidence, there can be no substantial evidence to the contrary. This by no means follows. We do not decide credibility here, nor did the circuit court. We find, and hold, that there **was** substantial and competent evidence to support the decision and order, that they were not contrary to the overwhelming weight of the evidence, and that they could reasonably have been made by the Hearing Commission and the Board. Such is the test. Gaddy v. State Board of Registration, Mo. App., 397 S. W. 2d 347; Bridges v. State Board of Registration, Mo. App., 419 S. W. 2d 278; Rose v. State Board of Registration, Mo., 397 S. W. 2d 570.

There was much detailed evidence at the hearing, including certain parts transposed from the criminal trial. We shall not make a detailed statement. The essence of the evidence on behalf of the Board showed the facts which we now state. One Margaret Pyle, 18 years of age, came to Scott Air Force Base (east of St. Louis) as a woman member of the Air Force in August 1965; she soon met Robert Portwood, also a member of the Air Force there, and serving as a dental technician. These two had repeated sexual relations from August or September 1965 for a period of several months. In January 1966, Margaret had no menstrual period and she so told Robert. On Friday evening, February 11, 1966, Robert, Margaret and one Cordie Thomas (also a member of the women's branch of the Air Force) traveled in Robert's car to the appellant's office at 4635 Easton Avenue in St. Louis; Robert waited in the car while the girls went in and stayed for 1 to 1½ hours. Cordie Thomas talked to the receptionist for Margaret, but gave her (Cordie's) name, stating that Margaret had a cold and sore throat; they were taken to appellant and Cordie then told him that they had come to see if Margaret "could get an abortion," but that they only had $70; Margaret then and there gave appellant the $70 and he took it and put it in his pocket; he then put her (Margaret) into an examining room, had her undress and get on a table with her legs raised; only these two were present, and there were a lot of instruments around; he distended her vagina with some instrument and used another one which was shaped like a long pair of scissors up inside her vagina; she felt motion, like he was "cutting"; this went on for "3 or 4 minutes," perhaps; he later placed cotton in her vagina, told her to take it out when she got home, and left her. Margaret recalled no conversation regarding any prescription. She dressed herself and she and Robert stayed at a motel until Sunday, February 13th; the girl began

to feel badly during the following week with a vaginal discharge and pains in her stomach or abdomen; her condition continued to deteriorate until Robert (accompanied again by Cordie) took her back to appellant's office on the evening of February 24th; at that time she was assisted into the office; appellant examined her vaginally, catheterized her (because she could not then urinate) and gave her a prescription which was not filled until the next night; she went back to appellant's office the next night because of pain and was again examined with instruments being used in her vagina; he told her to get the prescription filled and that she should go to a hospital; she did get the medicine (through Cordie) and returned to the Base; but on the next evening her condition was so serious that Robert took her to the Base Hospital. She was examined there promptly and the Air Force surgeon found extensive pus, both inside and outside the vaginal canal, a circumferential, old laceration or tear around the upper part of the vagina just below the cervix, a large abscess between the uterus and the rectum, and a highly septic condition. He stated that in his opinion Margaret had had a septic abortion procured by outside intervention; tests then made showed a recent pregnancy; he further testified that any instrument introduced into the uterus, even for a short time, could cause an abortion. The infection was first drained and this was followed very shortly by a complete hysterectomy. This physician saw no burned or necrotic areas in the vaginal canal. The recovery was apparently uneventful; Robert and Margaret were married in March 1966. She testified that she had done nothing to procure an abortion, nor had anyone except appellant inserted any instrument into her; her health was good until February 11, 1966. She had been to no other physician. The foregoing, in our opinion, constitutes competent and substantial evidence upon which the decision and order of the Board might reasonably be made.

Defendant denied all of this substantive testimony, insofar as it concerned the matter of an abortion. He admitted that Margaret was in his office as Cordie Thomas for a cold and sore throat on February 11, 1966, and said that he treated her at that time and telephoned a prescription to his neighborhood drugstore. He further testified: that he examined her again on the evening of February 24, 1966, at which time he found various areas of necrosis inside her vagina, with an odor, temperature and a distended abdomen; that she admitted at that time that she had used a catheter and lysol on herself, and that he promptly told her to get in touch with her mother and enter a hospital; that he then gave her a prescription for an antibiotic. He denied that she returned on February 25th. In other words the appellant has completely denied the acts charged, and places the blame upon Margaret herself; his office girl testified that she was present on both occasions and corroborated appellant in all substantial respects. We need go no further into the many details. As in other cases, there were inconsistencies shown pro and con, and also corroborations. Among the latter was the fact that Margaret could have received free medical attention at her Base Hospital for any legitimate complaint.

Most assuredly, as counsel in effect have conceded, this case turned on the issue of credibility. This girl, very naturally, could not know all that transpired on the evening of February 11th nor could she identify properly the instruments used. The fact is obvious that she was pregnant and that she was aborted; further, she denied that anyone except appellant did anything to procure the abortion. The Hearing Commissioner and the Board have believed the substance of Margaret's testimony; it constituted substantial and competent evidence and it afforded, if believed, an entirely reasonable basis for the decision made. We do not find that the decision was

against the overwhelming weight of the evidence. So finding, we shall necessarily affirm.

We note one further matter. Counsel complain that the Commissioner and the Board gave little or no consideration to appellant's "long and honorable record," both in medicine and public service; his accomplishments, it is true, seem to be substantial. His status is not a defense on the merits to such a complaint as this; at best, it could go only to his credibility and to the extent of the discipline. On the first, the Commissioner and the Board have seen fit to disbelieve him and their decision is final. On the second phase, it seems to us that the Board has considered his prior standing, in that it granted him leave to apply for reinstatement after six months. That decision also is final.

The judgment is affirmed and we now vacate the order of stay heretofore entered.

.....

Henry I. Eager, Special Commissioner.

Per Curiam: The foregoing opinion by Eager, Special Commissioner, is adopted as the opinion of the Court.

Seiler, P. J., concurs.

Storckman, J., and Henley, Alt. J., concur.

Holman, J., not sitting when cause was submitted.

APPENDIX B.

And Thereafter the following proceedings were had and entered of record in said cause on the 14th of July, 1969, to-wit:

Walter A. Younge, M. D.,

Appellant,

54160

State Board of Registration for the Healing Arts,

Respondent.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of St. Louis City rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellant its costs and charges herein expended and have therefor execution.

It is further ordered that the order of this court made on October 4, 1968, staying the order of the respondent State Board of Registration for the Healing Arts pending determination of the appeal in this cause be, and is hereby vacated (Opinion filed).

APPENDIX C.

And Thereafter the following proceedings were had and entered of record in this cause on the 8th day of September, 1969, to-wit:

Walter A. Younge, M. D.,

Appellant,

54160

State Board of Registration for the Healing Arts,

Respondent.

Now at this day the Court having seen and fully considered the motion of the appellant for a rehearing in the above-entitled cause, or in the alternative, to transfer said cause to the Court en Banc, doth order that said motion be and the same is hereby overruled.

The Court further orders that the appellant's motion for stay of enforcement of the order of the State Board of Registration for the Healing Arts in this cause be, and the same is also overruled.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 897

WALTER A. YOUNGE, M.D.,
Petitioner,

vs.

STATE BOARD OF REGISTRATION FOR THE HEALING ARTS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1969

No. 897

WALTER A. YOUNGE, M.D.,
Petitioner,

vs.

STATE BOARD OF REGISTRATION FOR THE HEALING ARTS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent adopts petitioner's statement of the case and the matters set forth in the petition as required by U.S. Sup. Ct. Rule 40-1(a), (b), (c) and (d), with the exception hereinafter noted.

STATUTES INVOLVED

Most of the provisions of Paragraph 2 of Section 334.100, R.S. Mo., set out on pages 3 and 4 of the petition were effectively repealed in 1965 by the Seventy-Third General Assembly of Missouri when it enacted Senate Bill 284, Laws of Missouri, 1965, p. 277.

Section 3 of said bill (now codified as Section 161.272, R.S. Mo. Cum. Sup. 1967) reads in pertinent part:

> "The administrative hearing commission shall conduct hearings and make findings of fact and conclusions of law in those cases wherein, under the law, a license issued by any of the following agencies may be revoked or suspended or wherein the licensee may be placed on probation or wherein an agency refuses to permit an applicant to be examined upon his qualifications or refuses to issue or renew a license of an applicant who has passed an examination:
>
> * * *
>
> State Board of Registration for the Healing Arts. . . ."

Section 11 of said bill (not codified by the Revisor of Statutes but contained in *Laws of Missouri, 1965*, p. 280) reads as follows:

> "Section 11. Any provisions of existing statutes pertaining to the administrative agencies listed in Section 3 (161.272) which are in conflict with this act are repealed."

Section 5 of said bill (now codified as Section 161.292, R.S. Mo. Cum. Sup. 1967) reads in pertinent part:

> "Upon a finding in any cause charged by the complaint for which the license may be suspended or revoked as provided in the statutes and regulations relating to the profession or vocation of the licensee, the commis-

sion shall deliver or transmit by certified mail to the agency which issued the license the record of the proceedings before the commission together with the commission's findings of fact and conclusions of law. The commission may make recommendations as to appropriate disciplinary action but any such recommendations shall not be binding upon the agency."

REASONS FOR DENYING THE WRIT

I.

Revocation of Petitioner's License After His Acquittal of the Criminal Charge of Abortion Did Not Violate His Rights Relating to Double Jeopardy.

This Court has very recently said that the Fifth Amendment guarantee against double jeopardy consists ". . . of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina* v. *Pearce*, (1969) 395 U.S. 711, 23 L.Ed. 2d 656, 664-665, 89 S.Ct. ____. Hence, if petitioner's contention were correct, a physician *convicted of abortion* would be immune from subsequent license revocation proceedings based on the same act, because such proceedings would constitute "multiple punishments".

However, revocation of a physician's license in Missouri is not effected to punish the physician, but rather to protect the public. This was the subject of extended discussion in the opinion of the Missouri Supreme Court in this case. In the opinion, the Court once again repeated that two early cases characterizing the revocation statute as penal were overruled: *State ex rel. Spriggs* v. *Robinson*, (1913) 253 Mo. 271, 161 S.W. 1169; *State ex rel. Johnson*

v. *Clark*, (1921) 288 Mo. 659, 232 S.W. 1031. In this case, the Supreme Court of Missouri said (R. 521; Petition, Appendix A5-6):

> "Insofar as Spriggs and Johnson held the statute to be penal, they have been overruled. Hughes v. State Board of Health, Mo., 159 S.W. 2d 277; Gaddy v. State Board of Registration, Mo.App., 397 S.W. 2d 347; Bittiker v. State Board of Registration, Mo.App., 404 S.W. 2d 402; State ex rel. Lentine v. State Board of Health, Mo., 65 S.W. 2d 943. In Hughes, the court directly held that (in this respect) the Spriggs case had been overruled, that the statute was one 'for the protection of the public in safeguarding public health,' and that it was not an imposition of punishment. Counsel for appellant seems to doubt the effect of these later decisions. If any doubt remains, and there should be none, we now hold that our revocation statute is *not* penal in nature and we reaffirm the later doctrine as just stated. In this view, it is wholly unnecessary to consider the many authorities cited from other states for our own policy is established. These revocation proceedings are not penal, they are not 'quasi-criminal', they do not contemplate 'punitive' sanctions and the provisions against double jeopardy do not apply. The appellant is not being tried again for the same 'offense'. He is not, in fact, being tried for any offense."

Petitioner argues, with respect to double jeopardy, that he is protected by the principle "that an acquittal in a criminal prosecution bars a subsequent civil action imposing punitive sanctions." Petitioner then concedes that the "applicability" of his argument "depends upon whether the physicians' license revocation statute under Mo. Rev. Stat., §334.100 is construed as penal in nature."

It is submitted that this concession alone would require the denial of the writ on this point because this Court traditionally accepts the construction accorded to a state

statute by the highest court of that state. *Adderley* v. *Florida,* (1966) 385 U.S. 39, 46, 17 L.Ed. 2d 149, 155, 87 S.Ct. 242; *Lerner* v. *Casey,* (1958) 357 U.S. 468, 471, 2 L.Ed. 2d 1423, 1427, 78 S.Ct. 1311; *Barsky* v. *Board of Regents of N. Y.,* (1954) 347 U.S. 442, 448, 98 L.Ed. 829, 837, 74 S.Ct. 650.

Moreover, this Court has explicitly held that the "question" of whether a particular statute imposes a criminal or remedial sanction "is one of statutory construction." *Helvering* v. *Mitchell,* (1938) 303 U.S. 391, 399, 82 L.Ed. 917, 922, 58 S.Ct. 630. Inasmuch as the Supreme Court of Missouri has said "that our revocation statute is *not* penal in nature" (R. 521; Petition, Appendix A5), it is submitted that this Court should not undertake to construe it differently.

But respondent need not rely upon this Court's custom of deferring to an interpretation of a state statute given by the highest court of that state, for this Court has long held that statutes of the type here under scrutiny impose remedial rather than criminal sanctions and therefore do not violate double jeopardy.

It is undoubtedly true that the revocation of a practicing physician's license works a hardship on him and that he is not to be deprived of the privileges conferred by such license without procedural due process. *In re Ruffalo,* (1968) 390 U.S. 544, 20 L.Ed. 2d 117, 88 S.Ct. 1222. But any such hardship results as an adjunct to the fulfillment of the fundamental purpose of license revocation procedures, i.e., the protection of the public by the exercise of the police powers of the state. As this Court observed in *Flemming* v. *Nestor,* (1960) 363 U.S. 603, 616, 4 L.Ed. 2d 1435, 1447-1448, 80 S.Ct. 1367:

> "Similarly, the setting by a State of qualifications for the practice of medicine, and their modification from time to time, is an incident of the State's power to pro-

> tect the health and safety of its citizens, and its decision to bar from practice persons who commit or have committed a felony is taken as evidencing an intent to exercise that regulatory power, and *not a purpose to add to the punishment of ex-felons.*" (Emphasis added).

In support of the foregoing, the Court cited *Hawker* v. *State of New York*, (1897) 170 U.S. 189, 42 L.Ed. 1002, 18 S.Ct. 573, wherein this Court rejected an argument that a statute prohibiting a convicted felon from practicing medicine, which statute was enacted after the conviction, added to his punishment and was therefore an ex post facto law. There the Court said, 170 U.S. 189, 196, 42 L.Ed. 1002, 1006, "The state is not seeking to further punish a criminal, but only to protect its citizens from physicians of bad character. The vital matter is not the conviction, but the violation, of law. The former is merely the prescribed evidence of the latter."

The instant case is directly analogous. Section 334.100, R.S. Mo. Cum. Sup. 1967 (Petition, p. 3), authorizes respondent to revoke a license for unprofessional and dishonorable conduct and provides in part:

> "Without limiting the foregoing general language, the following specifications shall be deemed unprofessional and dishonorable conduct within the meaning of this section:
>
> * * *
>
> "(3) Committing an unlawful abortion; . . ."

In the instant case, the "committing of an unlawful abortion . . ." was the "prescribed evidence" of unprofessional and dishonorable conduct warranting revocation. Conviction or acquittal of the felony of abortion was not an issue.

In *Helvering* v. *Mitchell,* (1938) 303 U.S. 391, 82 L.Ed. 917, 922, 58 S.Ct. 630, 633, this Court specifically held that the fifty percent penalty on evaded income tax, sought in a civil action after an acquittal on criminal charges, did not violate the principle of double jeopardy because it was a civil and not a criminal sanction. At 303 U.S. 399-400, 82 L.Ed. 922, the Court said, "Remedial sanctions may be of varying types. One which is characteristically free of the punitive criminal element is revocation of a privilege voluntarily granted." By way of a footnote illustrating this point, the Court said "Disbarment is likewise a sanction of this type. Ex parte Wall, 107 U.S. 265, 27 L.Ed. 552, 2 S.Ct. 569." And at 303 U.S. 404, 82 L.Ed. 925, the Court said ". . . finally, in the civil enforcement of a remedial sanction there can be no double jeopardy."

Holdings similar to *Helvering* v. *Mitchell,* supra, are found in other cases, including: *United States ex rel. Marcus* v. *Hess,* (1942) 317 U.S. 537, 548-549, 87 L.Ed. 443, 451-453, 63 S.Ct. 379, wherein the Court rejected a double jeopardy argument in an informer suit for forfeitures of money and double damages after the defendant had been convicted of a crime arising out of the same acts. The Hess case is of particular interest because the Court acknowledges that enforcement of the statute may have the incidental effect of punishing the wrongdoer, ". . . but this is not enough to label it as a criminal statute." Id. 317 U.S. at 551. And see *Rex Trailer Co.* v. *U. S.,* (1956) 350 U.S. 148, 100 L.Ed. 149, 76 S.Ct. 219, wherein, after a conviction for fraudulently obtaining surplus war materials, the defendant company was held liable for a recovery of two thousand dollars on each of its five purchases, in spite of the absence of a showing of any actual damages and defendant's plea of double jeopardy.

On the basis of the foregoing, it is submitted that the opinion of the Missouri Supreme Court is in perfect ac-

cord with the decisions of this Court. The cases cited by the petitioner to the contrary are readily distinguishable (Petition, p. 11): *Cummings* v. *Missouri*, (1867) 71 U.S. 270, 18 L.Ed. 356, and *Ex parte Garland*, (1867) 71 U.S. 333, 18 L.Ed. 366, for the reasons stated in *Hawker* v. *State of New York*, supra, 170 U.S. 189, 198-199; *Bridges* v. *Wixon*, (1945) 326 U.S. 135, 154, 89 L.Ed. 2103, 65 S.Ct. 1443, 1452, which condemns the use of unsworn written statements in deportation proceedings; *Jordan* v. *De George*, (1951) 341 U.S. 223, 231, 95 L.Ed. 886, 892, 71 S.Ct. 703, 708, which held that the vagueness doctrine must be applied to a statute stating grounds for deportation of aliens because of the "grave nature of deportation"; *Fong Haw Tan* v. *Phelan*, (1948) 333 U.S. 6, 10, 92 L.Ed. 433, 436, 68 S.Ct. 374, 376, which accorded to a deportation statute "the narrowest of several possible meanings" because "the stakes are considerable . . ."; *Kennedy* v. *Mendoza-Martinez*, (1963) 372 U.S. 144, 9 L.Ed. 2d 644, 83 S.Ct. 554, which held unconstitutional certain statutes which permitted forfeiture of citizenship for leaving the country to evade the draft because they imposed punishment without requiring procedural due process; *Spevack* v. *Klein*, (1967) 385 U.S. 511, 17 L.Ed. 2d 574, 87 S.Ct. 625, wherein it was held that disbarment of an attorney upon grounds that he had asserted his right not to incriminate himself in a judicial proceeding violated his rights under the Fifth and Fourteenth Amendments.

The most that can be said for any of these cases is that they require a degree of fairness in the conduct of the proceedings commensurate with the importance of the matter in issue, i.e. procedural due process, which is not an issue here. In none of the cases did the Court hold that the proceedings violated the principle of double jeopardy, in spite of the fact that several grew out of or were closely related to criminal prosecutions.

Similarly, petitioner makes the broad claim that if he had been acquitted in some state which regards its revocation statute as penal, the principle of double jeopardy would have prevented the revocation of his license. None of the cases cited by petitioner on this proposition so hold (Petition, pp. 9-10). What those cases, with the exception of *In re Kindschi*, (1958) 52 Wash. 2d 8, 319 P. 2d 824, do hold is that *for purposes of statutory construction* revocation statutes are regarded as penal and are therefore strictly construed in favor of a physician on such issues as whether the acts alleged constitute a violation of the statute. The *Kindschi* case, supra, characterized revocation proceedings as quasi-criminal, yet affirmed a suspension of the physician's license for a conviction of attempting to evade the payment of federal income taxes. It is submitted that petitioner's reliance upon these cases cannot be persuasive on the issue at hand. A rule adopted to facilitate statutory construction cannot be elevated to the stature of a constitutional requirement by its use of the word "penal". The fact that some states hold that a physician will be given the benefit of the doubt in the interpretation of revocation statutes by no means constitutes a holding that a physician acquitted—or convicted—of a felony is thereafter protected from having his license revoked by the rule against double jeopardy.

It is therefore respectfully submitted that the revocation of petitioner's license in the instant case, being a remedial sanction for the protection of the public, does not violate his right to the protection of the double jeopardy clause of the Fifth Amendment. In the words of the Court below ". . . the provisions against double jeopardy do not apply. The appellant is not being tried again for the same 'offense'. He is not, in fact, being tried for any offense." (R. 521; Petition, Appendix A5-6).

II.

Petitioner's Acquittal of the Criminal Charge of Abortion Did Not, under the Principles of Res Judicata or Collateral Estoppel, Bar This Respondent from Maintaining Administrative Proceedings Leading to the Revocation of Petitioner's License As a Physician. Moreover, Such Issue Raises No Federal Question.

In *Hoag* v. *New Jersey*, (1958) 356 U.S. 464, 470, 2 L.Ed. 2d 913, 919, 78 S.Ct. 829, this Court said:

> "A common statement of the rule of collateral estoppel is that 'where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action.' Restatement, Judgments, §68(1)."

An essential element of the foregoing definition is that, to be conclusive, the determination must be between the same parties. Such was not the case here. In the criminal proceeding, the State of Missouri was the plaintiff; in the license revocation proceeding, the Board of Registration for the Healing Arts was the moving party. The Board is not the State of Missouri; and the Supreme Court of Missouri, in *Gaddy* v. *State Board of Registration for the Healing Arts*, (Mo.Sup., 1965) 394 S.W. 2d 284, said of a contention to the contrary: "This is incorrect and Respondent's motion to transfer to the Court of Appeals must be sustained. The party involved is the Board which is *an artificial legal entity in the nature of a quasi public corporation.*" (Emphasis added). The Supreme Court of Missouri took the same position in its opinion herein (R. 523, Petition, Appendix A8).

But an even more fundamental reason exists which prevents the application of the principles of collateral

estoppel and res judicata to the instant case: an acquittal in a criminal case is not a determination of a "fact essential to the judgment" in a subsequent proceeding of this nature. In other words, petitioner's acquittal of the criminal charge does not amount to a determination that he did not perform the abortion.

As this Court said in *Lewis* v. *Frick*, (1914) 233 U.S. 291, 301-302, 58 L.Ed. 967, 973, 34 S.Ct. 488:

> "... *the acquittal under the indictment was not equivalent to an affirmative finding of innocence, but merely to an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused.* The distinction between a criminal prosecution and an administrative inquiry by an executive department or subordinate officers thereof has been often pointed out." (Emphasis added).

Similarly this Court held in *Helvering* v. *Mitchell*, (1938) 303 U.S. 391, 397, 82 L.Ed. 917, 921, 58 S.Ct. 630, that a prior acquittal in an income tax evasion prosecution was not res judicata as to a subsequent civil proceeding for the fifty percent penalty, saying "it (the acquittal) did not determine that Mitchell had not willfully attempted to evade the tax. That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled." (Parenthetical matter supplied.) See also *Murphy* v. *U. S.*, (1926) 272 U.S. 630, 632-633, 71 L.Ed. 446, 457, 47 S.Ct. 218.

Helvering v. *Mitchell*, supra, 303 U.S. 391, 405-406, 82 L.Ed. 917, 925-926, also effectively distinguishes *Coffey* v. *U. S.*, (1886) 116 U.S. 436. 29 L.Ed. 684, 6 S.Ct. 437, on which petitioner principally relies, by saying that the rule of *Coffey* presents no "obstacle" to a subsequent action "imposing a civil administrative sanction."

In *Hoag* v. *New Jersey*, supra, this Court, noting that "jury verdicts are sometimes inconsistent or irrational", declined to hold that collateral estoppel is a constitutional requirement. *Hoag* involved a criminal prosecution for an armed robbery of one of five individuals after an acquittal of an indictment for the simultaneous robbery of three of the five. The evidence was the same in both cases, and the defendant relied on the same alibi in both. This Court said that ". . . we would have to embark on sheer speculation in order to decide that the jury's verdict at the earlier trial necessarily embraced a determination favorable to the petitioner on the issue of 'identity'." 356 U.S. 464, 472, 2 L.Ed. 2d 913, 920.

In the instant case, the evidence before the Administrative Hearing Commission was substantially the same as that adduced on the criminal trial. However, there were some differences, an example of which is discussed in respondent's brief before the Supreme Court of Missouri, as follows (R. 511-512):

> "Further corroborating Margaret's testimony and casting further doubt on the veracity of Dr. Younge and Mrs. Eutz was the evidence concerning the 'many' burned areas within Margaret's vagina. When Dr. Fischer testified for the prosecution in the criminal case, he was not asked either on direct or cross-examination about the presence or absence of the necrotic spots caused by a Lysol-like substance. . . . After the prosecution rested, Dr. Younge testified in the criminal trial that Margaret admitted to him on February 24 that she had used Lysol to abort herself and that he saw twelve or thirteen necrotic areas caused by chemical burns. Before the Hearing Commission on direct examination, Dr. Younge stated he saw 'several areas of necrosis' (R. 217); but when he was reminded of his trial testimony on cross-examination, Dr. Younge said there were 'many' such areas (R. 246).

> "However, these necrotic areas, which Younge claimed were plainly visible throughout the vagina (R. 248) and which were so necessary to his Lysol-defense theory, were not present when Dr. Fischer examined the girl around midnight on February 27, although he looked for such marks (R. 194). Dr. Fischer testified unequivocally before the Hearing Commission that, had the necrotic areas been present on February 24, they would have been there on February 27 or 28. Yet he found none (R. 190-191)." (Transcript references in the foregoing quote have been changed to conform to the pages in the Record before this Court.)

From the foregoing, it may be seen that petitioner's defense (that the girl aborted herself) was rebutted by independent medical testimony in the administrative proceeding but not in the criminal trial. To attempt to apply the principles of res judicata and collateral estoppel under these circumstances would be tantamount to holding that this respondent was irrevocably bound by the evidence adduced by the prosecuting officials in the criminal case. It is submitted that this respondent had not only the right but the duty to seek, in the administrative forum designated by law, a determintion as to whether petitioner had performed such acts as to warrant the revocation or limitation of his right to practice medicine. A ruling to the contrary in the name of due process for the petitioner would prevent this respondent from performing one of its most important functions, the protection of the public from those who should not practice the healing arts.

Furthermore, in the instant case, the difference between the degree of proof necessary for conviction and that which was necessary to sustain the administrative finding, in and of itself, militates against any holding that the latter proceeding was barred by the acquittal in the former. It is therefore submitted that no federal question of substance exists and that the writ should not issue.

CONCLUSION

It is respectfully submitted that the foregoing demonstrates that there are no "special and important reasons" warranting the issuance of the writ of certiorari in this case, U. S. Sup. Ct. Rule 19, 28 U.S.C.A., that this case presents no federal question of substance not heretofore decided by this Court, and that the decision of the Supreme Court of Missouri herein is in complete harmony with prior decisions of this Court. It is therefore submitted that the writ should not issue.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 897

WALTER A. YOUNGE, M. D.,
Petitioner,

v.

STATE BOARD OF REGISTRATION FOR THE HEALING ARTS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Missouri

PETITION FOR REHEARING

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PETITION FOR REHEARING

The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari entered on February 24, 1970, and (2) granting

the petition for writ of certiorari. Petitioner has not previously presented to this Court the following substantial constitutional ground upon which this petition for rehearing is founded.

Missouri Rev. Stat., § 334.100 is so vague, indefinite and uncertain as to deprive petitioner of due process of law in violation of the Fourteenth Amendment to the United States Constitution.

On February 24, 1970, the same day certiorari was denied in the instant case, this Court denied certiorari in **California v. Belous**, No. 971, Oct. Term, 1969. In that case, the California Supreme Court held the California abortion statute (Penal Code, Section 274) unconstitutional. See **People v. Belous**, 80 Cal. Rptr. 354, 458 P. 2d 194 (1969). California petitioned this Court for a writ of certiorari to determine: (1) whether said statute was sufficiently specific to satisfy due process without improperly infringing on fundamental constitutional rights and (2) whether the State has a sufficient compelling interest that permits it to regulate a woman's right to terminate unborn life.

In the instant case, petitioner's license to practice medicine was revoked under Missouri Rev. Stat., § 334.100 for "committing an unlawful abortion." The definition of an unlawful abortion under Missouri law necessarily relates to the criminal abortion statute (Mo. Rev. Stat., § 559.100), which is similar in material respect to the unconstitutional California statute.[1] Petitioner submits that the same un-

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[1] Missouri Rev. Stat., § 559.100, provides as follows:

"Any person, who with intent to produce or promote a miscarriage or abortion, advises, gives, sells or administers to a woman (whether actually pregnant or not), or who, with such intent, procures or causes her to take, any drug, medicine or article, or uses upon her, or advises to or for her the use of any instrument or other method or device to produce a miscarriage or abortion (unless the same is

constitutional vagueness of the California statute, judicially denounced in **People v. Belous**, *supra* (which this Court has now declined to review), is present in Missouri Rev. Stat., §§ 334.100, 559.100.[2] As such, the question here, where a physician's license has been revoked on the basis of a constitutionally infirm law, is of grave constitutional concern.

Additionally, the District Court of the District of Columbia recently declared its similar abortion statute unconstitutional. See **United States v. Vuitch**, 305 F. Supp. 1032 (1969), docketed as number 1155 this Term. The whole tenor of that decision closely conforms to the issue presented herein. Petitioner submits that the scope and importance of the issue here presented in view of the recent decisions of **People v. Belous**, *supra*, and **United States v. Vuitch**, *supra*, amply justifies a reconsideration of the denial of certiorari.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioner prays that this Court grant rehearing of the order of de-

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necessary to preserve her life or that of an unborn child, or if such person is not a duly licensed physician, unless the said act has been advised by a duly licensed physician to be necessary for such a purpose), shall, in event of the death of said woman, or any quick child, whereof she may be pregnant, being thereby occasioned, upon conviction be adjudged guilty of manslaughter, and punished accordingly; and in case no such death ensue, such person shall be guilty of the felony of abortion, . . ."

[2] We point out that the California abortion statute in **People v. Belous**, *supra*, had been amended by the legislature prior to the time the petition for writ of certiorari was docketed. The Missouri legislature, however, has not seen fit to enact new abortion legislation.

nial, vacate that order, grant the petition and review the judgment below.

Respectfully submitted

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Certificate of Counsel

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

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